LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 9 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 280

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

vs.

UTAH LABOR RELATIONS BOARD,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF APPELLEE

E. R. CALLISTER,
Attorney General of Utah,
RAYMOND W. GEE,
Assistant Attorney General of Utah,
236 State Capitol,
Salt Lake City, Utah,
Attorneys for Appellee.

TABLE OF CONTENTS

	Page
STATUTES INVOLVED	1-2
THE QUESTION PRESENTED	2
STATEMENT OF THE CASE	2-6
SUMMARY OF ARGUMENT	6-10
ARGUMENT	10-38
POINT I. THE NATIONAL LABOR RELATIONS ACT HAS NOT TOTALLY PREEMPTED THE FIELD OF REGULATING INDUSTRIAL RELATIONS INVOLVING INTERSTATE COMMERCE	10-18
POINT II. EVEN THOUGH CONGRESS HAS CONTROL OVER INTERSTATE COMMERCE AND HAS DELEGATED THAT AUTHORITY TO AN AGENCY, STATE JURISDICTION OVER THAT SUBJECT MATTER IS PRESERVED UNTIL THE AGENCY ACTS	18-24
POINT III. IN ENACTING SECTION 10(a) LABOR MANAGEMENT RELATIONS ACT, 1947, CONGRESS DID NOT INTEND TO DISPLACE STATE JURISDICTION OVER THE SUBJECT MATTER INVOLVED HERE	24-34
A. There is neither an express manifestation nor necessary implication that would justify a displacement of state authority	24-29
B. Congress did not intend to displace state jurisdiction, in view of the grave public injury that would otherwise result	30-34

TABLE OF CONTENTS—Continued

Page

POINT IV. THE NATIONAL LABOR RELATIONS BOARD DECLINED TO EXERCISE JURISDICTION IN THIS CASE; HOWEVER STATE JURISDICTION WOULD ATTACH ABSENT A FORMAL DECLINATION IF THE NATIONAL BOARD'S STANDARDS MAKE IT APPARENT THAT THE NATIONAL BOARD WOULD DECLINE JURISDICTION 35-38

CONCLUSION 39

CASES

Algoma Plywood Company v. Wisconsin Employment Board, 336 U. S. 301 . . . . . 9, 12, 26

Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740 11

Bethlehem Steel Co. v. New York Labor Relations Board, 330 U. S. 767 . . . . . 7-9, 13-16, 21, 26-29

Bird v. U. S., 187 U. S. 118, 124 30

Breeding Transfer Co., 110 N. L. R. B. 493, at 497, 35 L. R. R. M. 1020 23

Building Trades Council v. Kinard Construction Co., 346 U. S. 933 . . . . . 10, 27, 36

Garner v. Teamster's Union, 346 U. S. 485 . . . . . 15, 16, 27

Guss v. Utah Labor Relations Board (Utah), 296 P. 2d 733 at 738 17

International Union v. Wisconsin Employment Relations Board, 336 U. S. 245 12

Kelly v. Washington, 302 U. S. 1 . . . . . 7, 13, 17

Knowlton v. Moore, 178 U. S. 41 30

LaCrosse Telephone Co. v. W. E. R. B., 336 U. S. 18 . . . . . 7, 13, 14, 15, 16

TABLE OF CONTENTS—Continued

	Page
Missouri Pacific R. R. v. Larabee Flour Mills, 211 U. S. 612	7, 18
M-L-T Railroad v. Harris, 234 U. S. 412	19
Napier v. Atlantic Coastline R. R. Company, 272 U. S. 605	8, 25
Northwestern Bell Telephone Co. v. Nebraska State R. R. Commission, 297 U. S. 471	7, 19, 31
Palmer v. Massachusetts, 308 U. S. 79	29
Plankinton Packing Co. v. W. E. R. B., 338 U. S. 953	13, 15, 16.
Raisch Motors v. New York Labor Relations Board, 35 L. R. R. M. 1631	16
Reid v. Colorado, 187 U. S. 137	8, 25
Terminal R. R. Assn. v. Brotherhood of R. R. Trainmen, 318 U. S. 1	19
United Automobile, Aircraft and Agricultural Implement Workers v. Wisconsin Employment Relations Board, 351 U. S. 266, 100 L. Ed. Adv. 666	6, 7, 12, 34
United Construction Workers v. Laburnum Construction Corporation, 347 U. S. 656	6, 12, 17, 25
U. S. v. Powers, 307 U. S. 214	30
Weber v. Anheuser-Busch, 348 U. S. 468	6, 11, 37
Welch Company v. New Hampshire, 306 U. S. 79	7, 20

STATUTES

Labor Management Relations Act, 1947 Section 10(a)	8, 9, 23, 24, 25, 27, 28, 29

TABLE OF CONTENTS—Continued

MISCELLANEOUS MATERIALS

	Page
Address by N. L. R. B. General Counsel, George J. Bott, May 13, 1954, cited in 34 L. R. R. pp. 67-68	23
Feldblum, "Jurisdictional Tidelands in Labor Relations", Labor Law Journal, February 1952	16
Geyls, The National Labor Relations Board Jurisdictional Standards, A Problem in Federalism, XVI Revista Del Colegio De Aborgados de Puerto Rico 31	16
Intermediate Report of Trial Examiner Robert J. Shaughnessy	2-6
"Labor Law—Federal-State Jurisdiction—A Pre-Emption Question", 27 Rocky Mountain Law Review 330	16
"National Labor Relations Board Jnrisdictional Standards and State Jurisdiction", 50 Northwestern Law Review 190	16
New York Labor Relations Board (1949) Annual Report, 26 Labor Relations Reference Manual 69	25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 280

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

vs.

UTAH LABOR RELATIONS BOARD,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF APPELLEE

STATUTES INVOLVED

Appellant has referred to Sections 8, 9 and 10 (a) of the National Labor Relations Act, 61 Stat. 146, 29 U. S. C. 158-160 (a), and Sections 34-1-8 and 9, Utah Code Anno-

tated 1953, as being involved in this case. Insofar as it is necessary to meet appellant's argument, the federal statute is referred to herein, and the Utah law noted as being the basis upon which relief was granted.

THE QUESTION PRESENTED

The single question presented before this court for decision is whether the Utah State Labor Relations Board may take jurisdiction of a labor matter affecting interstate commerce when the National Labor Relations Board has declined jurisdiction of that matter because of budgetary reasons or upon the basis that the matter is one of local concern.

STATEMENT OF THE CASE

The appellee, Utah Labor Relations Board, is in substantial agreement with the statement of the case as set forth by the appellant. However, the Board is convinced that the public policy considerations involved in this case are of great magnitude and therefore certain portions of the unprinted record are herein made supplemental to appellant's statement. The Intermediate Report of Trial Examiner Robert J. Shaughnessy, as it pertains to the unfair labor practices of appellant and refusal to bargain, follows:

"THE UNFAIR LABOR PRACTICES

"1. THE DISCHARGES

"1. Charles Illsley was employed by the Respondent* in October of 1953. The following month

*At the hearing before the Utah Labor Relations Board Photo Sound Products Manufacturing Company (the Appellant herein) was designated as the Respondent, and United Steel-Workers of America, CIO was designated as the Claimant and Petitioner.

he signed a union authorization card. He became active immediately in promoting the Union among fellow employees. He acted as the Union observer at the time of the N. L. R. B. election. He later became a member of the Union negotiating committee and grievance committee. He participated in virtually all negotiations that were held between the Company and the Union until negotiations ceased. Illsley was discharged in August 1954 after negotiations had broken off and the N. L. R. B. had refused to issue a complaint.

"After the advent of the organization campaign it seems from all the evidence that a general attitude of anti-union conduct developed on the part of management towards the infant union. Negotiations were not satisfactory. The Respondent failed to give proper attention to the request of the Union for meetings or discussions on grievances. Since Mr. Illsley was spearheading the Union movement in all these fields, it follows that because of the general anti-union attitude of the Respondent they were most anxious to see him discharged.

"In point of seniority in his classification he was the oldest employee of the Respondent. His successor was another employee of the Respondent that did not work for Photo Sound but an entirely separate operation that the Respondent maintained elsewhere.

"The Referee finds and concludes that Charles Illsley was discharged solely because of his activities for and on behalf of the complainant Union.

"2. Gary Watrous was employed as a clerk and stock record keeper in the production shop and had been so employed since July 15, 1953. Mr. Watrous had attended a meeting of the Union at which the Respondent's manager, Mr. Garber, spoke. He had met in cars outside Respondent's place of business with the Union Representative, Mr. Mullet, and had been observed by Mr. Garber, who also knew the

occupation and purpose of Mr. Mullet. After obtaining permission for a two-week leave of absence for active duty with the Navy, the applicant found on his return that he had been replaced by someone from some other operation carried on by Mr. Guss. Prior to his departure for the Navy, Mr. Watrous had been questioned by Mr. Gerber as to how he had voted in the election. As will later appear, Mr. Gerber was known as being opposed to the Union.

"The Referee finds and concludes that Mr. Watrous had been discharged for his activities for and on behalf of the Union.

* * * *

"5. Victor Sismondi was employed in October of 1953 and discharged in April of 1954. The management of the Respondent advised him that he had been discharged for sloppy work. Apparently a number of valves were not properly cut and Sismondi was blamed for this error. Sismondi's activities in connection with the Union consisted primarily in signing a union designation card and distributing cards to other employees. He met with the Union Representative on a number of occasions and attended meetings with other employees. His employment lasted seven months. It seems difficult to the Referee to employ a machinist for such a period and at that time discover that he was not qualified to do the job. Such a shortcoming seems reasonable to determine after a few weeks of employment let alone seven months. It would appear that management had knowledge of the fact that Sismondi was a member of the Union and at best picked a poor time to discharge him immediately prior to the election.

* * * *

"3. THE REFUSAL TO BARGAIN

"Following the Certification by the N. L. R. B. the Union requested an immediate meeting for the

purpose of negotiating a contract. A number of letters and phone calls were made, meetings set and cancelled until finally an Unfair Labor Practice Charge was filed with the N. L. R. B.

"Following this a meeting was held on June 1, 1954 in the office of the Respondent's attorney, Peter M. Billings. Mr. Rasmussen, the Union's representative, supplied a proposed contract on behalf of the Union and represented that the matter was open for negotiations. Mr. Rasmussen also provided a proposed interim agreement for handling grievances. The matter was discussed generally with reference to general matters in the contract.

"Another meeting was held June 23, 1954 and at this meeting the interim agreement for handling grievances was signed. Shortly thereafter, the Respondent's attorney left town and did not return until August 11, 1954 at which time he found a letter from the Union requesting a meeting either the 11th, 12th or 13th of August. At the same time, the Respondent and his Attorney received word from the N. L. R. B. that they would not assume jurisdiction of the unfair labor practice charge previously filed by the Union.

"In the face of a request for a meeting to negotiate the contract by the Union on any one of three days, the Respondent ignored the request and by Counsel's own statement decided 'that the Steelworkers were dropping the matter of negotiation, because we had no further request.' From this time on, in spite of an open request for bargaining sessions, the Respondent made no further effort to contact either the Steelworker's Union or a member of the negotiating committee of Respondent's place of business.

"The Trial Examiner can only conclude that after the N. L. R. B. decision, the Respondents had no further intention of meeting or attempting to negotiate a contract. It must also be found that the

request for meetings were reasonable as to number, time and place. For these reasons the record supports a finding that the Respondent has since on or before refused to bargain collectively with the duly designated representative of their employees." (Unprinted portion of the record, pages 0022-0026.)

The Utah Labor Relations Board, on June 21, 1955, affirmed the Trial Examiner's rulings and adopted as its own the findings of facts as made in the Intermediate Report and Recommended Order (R. 18-21). The importance of the facts in this case, particularly the unfair labor charges and the refusal to bargain, become even more striking in view of the recent reversal of position by the United Steelworkers of America as set forth in its brief *amicus curiae*.

SUMMARY OF ARGUMENT

I. A plethora of authority sustains the proposition that federal labor legislation has not totally pre-empted the field of industrial relations involving interstate commerce and that the National Labor Relations Board does not have exclusive jurisdiction over those labor matters. In *Weber* v. *Anheuser-Busch*, 348 U. S. 468, this court concluded that the Taft-Hartley Act did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause, and that much had been left to state jurisdiction. Recent precedent of this court points up important areas in which in-roads have been made upon federal preemption in the field of labor relations. See for example *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656; *United Automobile, Aircraft*

and Agricultural Implement Workers v. *Wisconsin Employment Relations Board*, 351 U. S. 266, 100 L. Ed. Adv. 666.

The appellant argues that the National Board has exclusive jurisdiction over the labor dispute involved in this case and cites as authority *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767; *LaCrosse Telephone Company* v. *W. E. R. B.*, 336 U. S. 18, and other cases in which federal and state legislation or action conflicted. The rationale upon which this court precluded state jurisdiction in those cases is inapplicable here. This case does not involve a direct or positive conflict of state and federal power, nor a contest between the National Labor Relations Board and the Utah Labor Relations Board to ascertain which is the master of a given labor dispute.

The exercise of state police power is superseded only where the repugnance of conflict between state and federal action is so direct and positive that the action of each cannot be reconciled. *Kelly* v. *Washington*, 302 U. S. 1. Inasmuch as this case involves no irreconcilable conflict of federal and state action, this state has jurisdiction to deal with local exigencies and to exert an essential protective power.

II. If the Federal government has occupied a given field of supervision, a state may nevertheless exercise control until the agency charged with enforcing the statute or regulation acts in pursuance of that authority. *Missouri Pacific R. R.* v. *Larabee Flour Mills*, 211 U. S. 612; *Northwestern Bell Telephone Co.* v. *Nebraska State R. R. Commission*, 297 U. S. 471; *Welch Company* v. *New Hampshire*, 306 U. S. 79.

It would seem a fortiori that where a federal agency has affirmatively declined jurisdiction over a labor matter, the arguments for allowing state action would be even more convincing than in a case where federal administrative action might have been taken but was not. When an affirmative declination is made, it is certain that the Federal government does not intend to occupy the area in question and the necessity for state jurisdiction becomes even more apparent when the public health, safety and welfare are involved.

This case is one in which federal power has been delegated but lies dormant and unexercised. *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767. The National Labor Relations Board in promulgating its yardsticks, and in this case declining jurisdiction, has defined the limits of congressional jurisdiction in the particular area. The Board's standards should be given the same effect in defining the limited area to be covered by the federal statute as they would have been accorded had they been included in the Federal Act at the time of its enactment.

III(A). It is conceded that there has been no cession of jurisdiction from the National Labor Relations Board to the Utah State Labor Board pursuant to Section 10(a), Labor Management Relations Act, 1947, and under the circumstances of this case cession is not necessary.

Authority of this court holds that federal pre-emption must be clearly manifest or implied from the nature of the federal legislation. *Reid* v. *Colorado*, 187 U. S. 137; *Napier* v. *Atlantic Coastline R. R. Company*, 272 U. S. 605. There is no such manifestation or implication found on the face of the legislation in question.

The 1947 proviso to Section 10(a) was enacted to clarify the status of cession agreements between the national and state labor boards as a result of doubt created by *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767. This conviction is sustained by *Algoma Plywood Company* v. *Wisconsin Employment Board*, 336 U. S. 301. It cannot be concluded, therefore, that Congress intended to preclude state jurisdiction in the case at hand, or that Section 10(a) is in any way applicable to the situation. Section 10(a) was intended to apply to those labor relations where the Board consistently asserts its jurisdiction, but where a state agency through a cession agreement would be available to assume a part of the burden.

A presumption exists in favor of state authority to act in labor disputes of this kind and any indulgence in construction of federal legislation relevant in this case should be resolved in favor of state jurisdiction.

III(B). It is inconceivable that the National Congress intended that a vacuum should result from an application of federal labor legislation, which would be the unfortunate result if state jurisdiction is denied. Labor unions and management have everything to gain by the application of law and order in this field. Historically Congress has been interested in applying law to a given labor dispute and despite party controversy or political theory, the question has never been absence of law, but the nature of law.

The protection and preservation of individual rights to bargain collectively and be free from the infringement of unfair labor practices cannot be over-emphasized. But of equal importance is the consideration of public welfare, health and safety, which have everything to gain by an ap-

plication of law and order in this instance. The state interest in law and order would preclude an interpretation imputing congressional intent to displace state jurisdiction in this matter.

IV. In the case at hand the National Labor Relations Board declined to exercise jurisdiction through its Regional Director. This in effect constituted denial by the Board, or at any rate made further appeal a futile gesture. The primary question at issue is therefore properly raised in this case. *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933.

Apart from the particular facts of this case, it is submitted that a state may properly exercise jurisdiction even though there has been no application to the National Board for appropriate relief, if in fact the labor dispute falls without the standards promulgated by the Board as setting forth the area included for regulation.

The purpose behind the adoption of jurisdictional yardsticks by the N. L. R. B. would be frustrated if the Board were called upon to decide every jurisdictional question, inasmuch as the yardsticks themselves define the limits of the Board's jurisdiction pursuant to the discretionary power vested in the agency by the national Congress.

ARGUMENT

POINT I.

THE NATIONAL LABOR RELATIONS ACT HAS NOT TOTALLY PRE-EMPTED THE FIELD OF REGULATING INDUSTRIAL RE-

LATIONS INVOLVING INTERSTATE COMMERCE.

Precedent of this court would (1) sustain the proposition that the Taft-Hartley Act has not totally pre-empted the field of industrial relations even though interstate commerce is involved, and (2) also sustain the resulting *sequitur* that the National Labor Relations Board would *not* have *exclusive* jurisdiction over those relations. We refer specifically to the case of *Weber* v. *Anheuser-Busch*, 348 U. S. 468, its treatment of the federal-state jurisdictional question regarding labor relations, and the following statement by the court:

> *"By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause.* Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner* v. *Teamsters, C. & H. Local Union (US)*, supra. But as the opinion in that case recalled, *the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.'* 346 U. S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation." (Emphasis added.)

Thus far, litigation has spelled out a reservation of state power in important areas of industrial relations involving interstate commerce. In the case of *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, this

court upheld the state's jurisdiction over mass picketing, threats of bodily injury, property damage, obstruction of streets, and the picketing of employees' homes.

State jurisdiction was sustained in the case of *International Union* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, which involved recurrent unannounced work stoppages, that conduct being neither prohibited nor protected by the Taft-Hartley Act. A state may forbid enforcement of a maintenance-of-membership clause in an employer-union contract. *Algoma Plywood & Veneer Company* v. *Wisconsin Employment Relations Board*, 336 U. S. 301. In *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656, an employer's action for damages resulting from violent conduct in a labor dispute, granted by a state court, was upheld by this court upon the theory that no relief was available under federal legislation, and therefore no conflict existed between state and federal action.

Recently this court concluded that a state had the power to prevent mass picketing, violence and overt threats of violence, even though such action is defined as an unfair labor practice under Taft-Hartley legislation. *United Automobile, Aircraft and Agricultural Implement Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; 100 L. Ed. Adv. 666.

Appellant presses upon the court the "exclusiveness" of the National Board's jurisdiction (Appellant's Brief, p. 9), and pre-emption under the Taft-Hartley Act, yet with inconsistency admits the inroads on the "exclusiveness" and pre-emption, and cites the *Algoma, Laburnum, United Auto-*

mobile, et al. and *International Union* cases as spelling out "room left for state action." (Appellant's Brief, p. 34.)

In support of federal pre-emption, appellant relies on *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767; *LaCrosse Telephone Co.* v. *W. E. R. B.*, 336 U. S. 18; and *Plankinton Packing Co.* v. *W. E. R. B.*, 338 U. S. 953. However the rationale upon which this court upheld federal action in each of those cases was that of conflict between federal and state action, a rationale without application here.

This principle of "irreconcilable conflict" was stated in the case of *Kelly* v. *Washington*, 302 U. S. 1, as follows:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases (*Simpson* v. *Shepard*) 230 U. S. 352, * * * States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. *The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'*" (Emphasis added.)

Applying the foregoing principle of constitutional law to the facts in *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767, this court held that the National Labor Relations Board's refusal to certify a foreman's union precluded state board certification, referring to the relevant state and federal statutes as follows:

> "Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past.
>
> "* * *
>
> "If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here."

In *LaCrosse Telephone Corporation* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, the court similarly held that conflicting federal-state legislation precluded a state labor board from certifying a bargaining representative on the theory that:

> "A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a

head-on collision. These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme even though it has not yet been applied in any formal way to this particular employer. The problem of employee representation is a sensitive and delicate one in industrial relations. The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy."

In referring to the *Bethlehem* decision, the *LaCrosse* court said:

> "* * * We thought the situation too fraught with potential conflict to permit the intrusion of the state agency."

See also *Plankinton Packing Company* v. *Wisconsin Employment Relations Board*, 338 U. S. 953.

Garner v. *Teamster's Union*, 346 U. S. 485, feared the potential conflict there at issue and stated:

> "To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue or that the state's temporary injunction will be dissolved as soon as the federal board acts. But experience gives no assurance of either alternative and there is no indication that the statute left it open for such conflicts to arise."

The case before this court does not involve a direct and positive conflict of state and federal power, nor a contest between the National Labor Relations Board and the Utah Labor Relations Board to ascertain which is the master of a given labor dispute. It is therefore submitted that the ration-

ale upon which state jurisdiction was denied in *Bethlehem*, *LaCrosse*, *Garner* and *Plankinton* is inapplicable here.

At this point it is important to note the distinction between a case where the National Labor Relations Board's determination not to hear a matter is in the nature of a decision, such as in the *Bethlehem Steel* case, and the situation before this court, where the National Labor Relations Board has refused jurisdiction due to budgetary reasons or because the matter is one of local concern. In the former situation, *Bethlehem*, the exercise of state jurisdiction would result in potential conflict. In the latter situation, which is in point here, no conflict exists because the declination to assert jurisdiction by the National Board amounts to a "hands off" action and disconcern as to the outcome of the labor dispute.

See *Raisch Motors* v. *New York Labor Relations Board*, 35 L. R. R. M. 1631; Feldblum, "Jurisdictional Tidelands in Labor Relations", Labor Law Journal, February 1952; Geyls, The National Labor Relations Board Jurisdictional Standards, A Problem in Federalism, XVI Revista Del Colegio De Aborgados de Puerto Rico 31; "Labor Law—Federal-State Jurisdiction—A Pre-Emption Question", 27 Rocky Mountain Law Review 330; "National Labor Relations Board Jurisdictional Standards and State Jurisdiction", 50 Northwestern Law Review 190.

The Supreme Court of the State of Utah, in using a different approach to the problem, found no conflict in this case as follows:

> "In the present case, there are no allegations that either party was deprived of rights which it might have obtained under the federal law had the N. L. R. B. heard the charges presented to it. There are, in

> fact, no intimations that the national Board would have disposed of the matter in a way other than that in which the state board did. No substantive conflicts between the provisions of the Taft-Hartley Act concerning unfair labor practices (29 U. S. C., sec. 158) and the Utah Code (U. C. A. 1953, 34-1-8) have been alleged nor do any appear with reference to the particular charges involved, i. e., discrimination against union employees and refusal to bargain collectively with certified representatives." (R. 33.) (296 P. 2d 733 at 738.)

The National Labor Relations Board unquestionably could have taken jurisdiction of the case at hand. Had it taken such action, the state board admittedly could not have acted under the principle announced in *Kelly* v. *Washington*, 302 U. S. 1. In view of the National Board's declination of jurisdiction and refusal to act in this instance, a further principle of constitutional law as set forth in the *Kelly* decision is applicable, for this court therein held that states are able to deal with local exigencies and to exert in the absence of conflict with federal regulation an essential protective power.

In *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656, this court upheld state jurisdiction where no federal administrative remedy was in conflict with state action, and stated:

> "The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed the state procedure would have survived."

The appellee submits that federal labor legislation has not totally pre-empted the field of industrial relations in-

volving interstate commerce and there is present in this case no irreconcilable conflict of federal and state action that would result in an application of the rule which would preclude state jurisdiction because of such conflict.

POINT II.

EVEN THOUGH CONGRESS HAS CONTROL OVER INTERSTATE COMMERCE AND HAS DELEGATED THAT AUTHORITY TO AN AGENCY, STATE JURISDICTION OVER THAT SUBJECT MATTER IS PRESERVED UNTIL THE AGENCY ACTS.

It has been held that if the federal government through Congress has occupied a given field of supervision, a state may nevertheless exercise control until the agency charged with enforcing the statute or regulation acts in pursuance of that authority. This principle was stated in the case of *Missouri Pacific Railway* v. *Larabee Flour Mills*, 211 U. S. 612, as follows:

> "* * * it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb

> the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. *In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens.* Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. *Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed.*" (Emphasis added.)

See also *Terminal R. R. Assn.* v. *Brotherhood of R. R. Trainmen*, 318 U. S. 1; *M-L-T Railroad* v. *Harris*, 234 U. S. 412.

In *Northwestern Bell Telephone Company* v. *Nebraska State Railway Commission*, 297 U. S. 471, the Congress had conferred upon the I. C. C. jurisdiction over accounts and depreciation rates of telephone companies. Pending action by the Interstate Commerce Commission pursuant to that authority, the state commission had prescribed depreciation rates. In upholding state regulatory power, this court stated:

> "The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Con-

gress intended by the amendment to § 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates."

"* * *

"A direction that the Commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute if so construed precludes our acceptance of such a construction."

In view of the foregoing authority, it would seem a fortiori that where a federal agency has affirmatively declined jurisdiction over a labor matter, the arguments for allowing state action would be even more convincing than in a case where the federal administrative action might have been taken but was not. When an affirmative declination is made, it is certain that the federal government does not intend to occupy the area in question and state control attaches. The necessity for state jurisdiction becomes even more apparent when the public health, safety and welfare are concerned.

In the case of *Welch Company* v. *New Hampshire*, 306 U. S. 79, the I. C. C. pursuant to the Federal Motor Carrier Act, prescribed but did not put into effect, regulations controlling specific periods of continuous driving by operators of common carriers, which regulations conflicted with the New Hampshire state law regulating motor vehicle carriers. Inasmuch as the federal regulations were not in effect, this court upheld state jurisdiction, stating:

"Without so deciding, we assume, so far as concerns the periods of continuous service condemned

by the state commission, that when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute. Then, the sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce."

"* * *

"In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed." (Emphasis added.)

The case presently before the court has public policy considerations which demand a mitigation of labor disputes which, if unregulated, would produce an injurious effect on the safety and welfare of the inhabitants of a state. The same policy considerations and legal precedent which resulted in the preservation of state jurisdiction in the *Welch* decision are equally compelling in this case. In *Bethlehem Steel Company* v. *the New York Labor Relations Board*, 330 U. S. 767, this court held that state jurisdiction attaches where federal power has been delegated but lies dormant and unexercised.

"However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280, 58 L. Ed. 1312, 34 S. Ct. 829, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered

> by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Teleph. Co.* v. *Nebraska State R. Commission*, 297 U. S. 471, 80 L. Ed. 810, 56 S. Ct. 536. supra; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 83 L. Ed. 500, 59 S. Ct. 438, supra. The states are in those cases permitted to use their police power in the interval. *Terminal R. Asso.* v. *Brotherhood of R. Trainmen*, 318 U. S. 1, 87 L. Ed. 571, 63 S. Ct. 420. However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute."

Those who attempt to distinguish the case at bar from rules of law set forth in the foregoing cases are met with the inescapable conclusion in *Bethlehem*, that where a declination to exercise full authority does not take on the character of a ruling, state jurisdiction is *not* superseded, and the constitutional principle regarding federal power which has been delegated but lies dormant is applicable. And clearly the declination here is not in the nature of a decision.

It is submitted that action by an administrative agency in effect amounts to action by Congress where Congress has *empowered*, but not directed the agency to act in cases affecting commerce. Under the general rules of "agency", action by the National Labor Relations Board would in this instance be equated to action by the National Congress. The National Board's declination is in fact a "defining [of] the limits of [the Board's] jurisdiction pursuant to the discre-

tionary power vested in [the Board] by the Congress." *Breeding Transfer Co.*, 110 N. L. R. B. 493, at 497.

Furthermore, the National Labor Relations Board in promulgating its yardsticks has in fact marked the extent of congressional jurisdiction in that area. The Board's standards should be given the same effect in defining the limited area to be covered by the federal statute as they would have been accorded had they been included in the federal act at the time of its enactment.

It is interesting to note that the National Board has given no indication that it would resist state jurisdiction in cases where the National Board has declined to exercise its powers because of budgetary reasons or that the matter is of local concern. To the contrary, the National Board's general counsel has asserted:

> "In practice the board never has, and I think I can confidently predict it never will interfere to block state action in a situation where the board chooses to stay its hand because it believes the impact of the activity on commerce would be insubstantial."
>
> "* * *
>
> "Once it is recognized that Congress has authorized the board at its discretion to withhold the full exercise of its jurisdiction, I cannot see any consideration of policy which makes it necessary or desirable to exclude the states from any field that the board properly abnegates in this way."

(See address by N. L. R. B. General Counsel, George J. Bott, May 13, 1954, cited in 34 L. R. R. pages 67-68.)

We therefore submit that where Congress has *empowered* (see Section 10(a)) an agency to act in a given area

but has *not made action mandatory*, the agency acting in pursuance of that authority is in effect drawing the jurisdictional line to be regulated by the federal government; and the area not included for regulation through agency action remains for appropriate state jurisdiction.

POINT III.

IN ENACTING SECTION 10(a) LABOR MANAGEMENT RELATIONS ACT, 1947, CONGRESS DID NOT INTEND TO DISPLACE STATE JURISDICTION OVER THE SUBJECT MATTER INVOLVED HERE.

A. There is neither an express manifestation nor necessary implication that would justify a displacement of state authority.

Section 10(a), Labor Management Relations Act of 1947 provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such

> agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

In a 1954 decision this court quoted an N. L. R. B. memorandum filed at the request of the court, as follows:

> "It is not feasible under the limitations prescribed by the Act to consummate ceding agreements to any states under the proviso." *United Construction Workers* v. *Laburnum Corporation*, 347 U. S. 656, Footnote 2.

The limitations mentioned by the National Labor Relations Board point up the fact that state labor relations laws are sufficiently inconsistent with the Labor Management Relations Act to preclude cessions agreements. The situation mentioned in the memorandum remains unchanged. For a state board's comments on resultant problems, see the discussion of New York Labor Relations Board (1949) Annual Report, 26 Labor Relations Reference Manual 69.

Appellee, therefore, concedes there has been no cession of jurisdiction from the National Labor Relations Board to the Utah State Labor Board, and under the circumstances of this case, cession is not necessary.

There is no clear manifestation in Section 10(a) itself that would indicate legislative intent to supersede state authority in cases where the National Board had declined jurisdiction, no express statement to that effect, nor language to create the necessary implication. Federal pre-emption must be "clearly manifest", *Reid* v. *Colorado*, 187 U. S. 137, or implied from the nature of the federal legislation. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605.

The proviso in Section 10(a) was enacted to clarify the status of cession agreements between the national and state labor boards as a result of doubt created by *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767. The concurring opinion in that decision stated in part:

> "Apart from the suggestion that the National Board's declination of jurisdiction 'in certain types of cases, for budgetary or other reasons' might leave room for the State in those situations, *the Court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the authority of the National Board.*" (Emphasis added.)

In order to eliminate the uncertainty created by the majority opinion—at least as interpreted by the concurring members of the court, the proviso was enacted in June of 1947, two months after the decision.

Algoma Plywood Company v. *Wisconsin Employment Relations Board*, 336 U. S. 301, emphasized that the purpose of the proviso was "to meet situations made possible by *Bethlehem Steel Corporation* v. *New York Labor Relations Board*, 330 U. S. 767 * * *"

Clearly the *Bethlehem* case did not pass upon the question presently at hand, for the court therein stated:

> "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem which we do not now decide."

The "situations made possible" by *Bethlehem* were those over which the National Board ordinarily exercised jurisdiction, but in particular instances had entered into cession agreements with certain state boards, the validity of which had in that case been questioned. Such "situations" are not analogous to that presented here. There is a vital distinction between a case where the N. L. R. B. had consented to state jurisdiction through a cession agreement prior to the *Bethlehem* case, and the situation where the National Board has refused jurisdiction because of lack of funds or the local character of the industrial relation. Section 10(a) was enacted to clarify the former "situation" only.

The *Bethlehem* decision specifically reserved the issue at hand, and the concurring opinion therein interpreted the decision as suggesting that the National Board's declination of jurisdiction in certain types of cases, for budgetary or other reasons would leave room for state jurisdiction. The court in *Garner* v. *Teamster's C & H Union*, 346 U. S. 485 (1953), held there was no "suggestion that respondents plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal board would decline to exercise its powers once its jurisdiction was invoked." As recently at 1954, the United States Supreme Court in the case of *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, held in a per curium decision:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the court does not pass upon the question suggested by the opinion below on whether the State court could grant its own relief should the Board decline to exercise its jurisdiction."

The two latter cases were decided after the enactment of the 1947 proviso to Section 10(a), implying that the proviso in question clearly did not preclude state jurisdiction, or resolve the issue.

It is submitted that the proviso of Section 10(a) was intended to apply to those labor relations where the Board consistently asserts its jurisdiction, but where a state agency would be available to assume a part of the burden. Such was the situation prior to the *Bethlehem Steel* case, where various states through cession agreements exercised regulatory power over labor relations, which in other jurisdictions were handled by the National Board. A state operating under the cession agreement must now have laws which are not inconsistent with the federal legislation, in order to preserve desired uniformity. However, where the National Board has declined jurisdiction, there would seem to be no need of uniformity inasmuch as the absence of regulation would produce a more flagrant conflict of results than would be present under diverse state administration.

It is argued that Section 10(a) was designed as a "club to induce state legislatures to correlate their acts with national policy * * *." (Appellant's brief p. 32.) But is it conceivable that the National Congress intended that individual rights in the field of labor relations should be contingent upon state adherence to national legislation?

The Federal Congress owes a duty to all national citizens and it is very questionable that the legislative branch would intentionally prejudice the rights of persons resident in Alabama because that state's labor laws do not in all respects conform with national standards, but provide the machinery

for protecting the rights of persons resident in Vermont, where hypothetically such conformity might exist. Those who might be denied the remedy or suffer the abuse may well be powerless to effect the conformity required.

It would seem that a presumption exists in favor of state authority to act in labor disputes of this kind, and in interpreting the federal legislation involved here, the court should resolve any doubts in favor of local jurisdiction.

As was stated in the concurring opinion in *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767:

> "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. *Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.*" (Emphasis added.)

See *Palmer* v. *Massachusetts*, 308 U. S. 79.

It is our firm conviction that the purpose of the proviso of Section 10(a) was to permit cession agreements in areas where the National Board consistently exercises its regulation; that nothing in the legislation or its history indicates an intent to supersede state regulation; that any construction in this instance should be made in favor of state jurisdiction.

B. Congress did not intend to displace state jurisdiction, in view of the grave public injury that would otherwise result.

In analyzing the federal legislation in question, great weight should be given to the result of statutory construction as bearing on the intent of Congress in effecting the enactment. The position urged by the appellant would impute to Congress the desire to create a no-man's land in the field of labor relations or the exaction of a price from the states, that being legislative conformity. Such a conclusion is absurd. The National Congress historically has been vitally concerned with law and order in the field of labor relations. Even in the midst of party controversy and diverse political theory, the question has always been the nature of the law applicable and not the absence of law.

In *Bird* v. *U. S.*, 187 U. S. 118, 124, this court set forth a rule of statutory construction pertinent here.

> "There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience."

See also *U. S.* v. *Powers*, 307 U. S. 214; *Knowlton* v. *Moore*, 178 U. S. 41.

To indulge in the approach advocated by the appellant would be to turn that presumption on its head and perpetuate a condition contrary to public interest.

It would seem paradoxical to hold that because the National Labor Relations Board once held an election in the case before us, the Union is beyond the control of the Utah State Labor Relations Board, because following that election

the National Labor Relations Board declined to assert jurisdiction on the grounds that the employer's business was predominantly local in character and would not add up to the standards necessary to meet the National Board's test for invoking jurisdiction.

By its ruling on July 21, 1954, in declining the instant case, the National Labor Relations Board in effect held that the employer's business impact on interstate commerce is so trivial as to warrant leaving disputes like it to local or state control.

To accept the argument of appellant is to concede that under the circumstances that were clearly demonstrated in this case, a no-man's land must exist at a state level because the National Board refuses to act. Cooperative labor relations and industrial peace cannot exist in a vacuum and should not be governed by the rules adopted by the parties to a controversy. See *Northwestern Bell Telephone Company* v. *Nebraska Railroad Company*, 297 U. S. 471. A decision precluding a state from exercising jurisdiction in the tidelands area might result in labor management activities in the future unregulated by federal law but prohibited by state law that would bar state enforcement and permit a climate of industrial relations that runs contrary to all public policy.

A labor union has much to gain by state jurisdiction being upheld in this instance. The particular facts of the case before the court would indicate that several workers were discharged because of activities for and on behalf of the United Steelworkers of America and that the appellant refused to bargain with the union, thus depriving both individuals and the group of rights guaranteed under both

federal and state laws. In the absence of the National Board's regulation of the unfair labor practices involved in this instance, no remedy would exist but for the exercise of state jurisdiction. This fact was well understood by the individuals who were discharged for activities on behalf of the union and by the union itself which pressed upon the Utah Labor Relations Board the argument that no relief was available unless it was through the state board. In support of state jurisdiction, the United Steelworkers of America argued before the Supreme Court of the State of Utah:

> "It is inconceivable that the National Congress intended that a vacuum should result from an application of federal labor legislation." (Union Brief, filed with the Supreme Court of Utah, p. 27.)

The situation remains unchanged. Members of labor unions have everything to gain from an application of law and order in this instance. If the National Labor Relations Board declines jurisdiction of a labor controversy where interstate commerce is involved, and the state board is precluded from exercising regulatory power, the particular union members are left without any remedy for unfair labor practices inflicted upon them.

Surprisingly enough, the United Steelworkers of America now file with this court a brief *amicus curiae* in which the union claims it to be the intent of Congress to create a void in the labor relations field, and the injuries suffered by the parties to this action are classed as non-catastrophic. What prompts the national counsel of the Steelworkers to argue for a reversal of the union's former position is left to conjecture, but strikingly enough its position, if now accepted by the court, would perpetuate a vacuum in the labor

relations field which could only be governed by "the rules of the jungle" so strongly argued against by this same union in the court below.

The position advocated by the union at this point of the litigation if adopted is of questionable consolation to Messrs. Illsley, Watrous, Sismondi, Lymon and the others who would lack a remedy for infringement of their right to bargain collectively (see statement of the case). The schizophrenic approach of the United Steelworkers is undoubtedly influenced by political consideration, for its brief includes excursions into areas of political debate and a commentary on the present membership of the National Board. We question the good faith of a labor organization which urges upon a state board and court a position it now argues against.

But whatever the motive of the national leadership of the labor union in question, the fact remains that individual union members are being denied rights which can only be protected in remedies granted if states are permitted to exercise jurisdiction under the facts at hand. It is absurd to interpret federal legislation as preventing this preservation and protective power.

As with the union, so with management. There is equal need for law and order to give adequate protection to management against the unfair labor practices that might result from union activity. Inasmuch as the companion cases reflect instances in which management is seeking a remedy through state courts, we deem it sufficient to state only that those cases speak for themselves as evidencing a need for the dual protection in labor relations where the National Labor Relations Board refuses to exercise its jurisdiction.

Granted that either management or labor might from time to time gain by the creation of a vacuum in the labor field, neither side could long escape direct injury. The sword would cut both ways. But whether management or labor could better its position in a no-man's situation is, of course, of secondary importance. Ultimate harm to the community must of necessity be the primary concern. Public welfare, health and safety have everything to gain by an application of law and order in this instance. This situation is more than an academic question or an opportunity to point up the relative attributes or failings of political administrations or the membership of the National Labor Relations Board.

Appellant, for purposes of argument, concedes that a state court might be permitted to act in this situation, but finds Section 10(a) as barring state board action. The distinction attempted seems without foundation, for if the state has jurisdiction in this case, it may certainly entrust such power to an administrative board. Such entrusting should not be the concern of this court. *United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; 100 L. Ed. Adv. 666.

The state interest in law and order would preclude an interpretation imputing Congressional intent to displace state jurisdiction in this matter. *United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; 100 L. Ed. Adv. 666. The creation and perpetuation of a labor relations no-man's land could produce nothing less than retrogression in the field of labor relations with resultant harm reflected in the lives and progress of a community.

POINT IV.

THE NATIONAL LABOR RELATIONS BOARD DECLINED TO EXERCISE JURISDICTION IN THIS CASE; HOWEVER STATE JURISDICTION WOULD ATTACH ABSENT A FORMAL DECLINATION IF THE NATIONAL BOARD'S STANDARDS MAKE IT APPARENT THAT THE NATIONAL BOARD WOULD DECLINE JURISDICTION.

In this case the United Steelworkers of America filed charges of violations under Section 8 of the National Labor Relations Act with the National Labor Relations Board, alleging that the employer, Guss, had engaged in unfair labor practices, and praying for appropriate relief. On July 21, 1954, the National Board, through its Regional Director, declined to consider the matter, stating:

> "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominantly local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction" (R. 4).

No appeal was taken from the action of the Regional Director.

Appellant for the first time now raises the question of whether declination by the Regional Director amounts to a refusal by the National Board to exercise its jurisdiction. At prior stages of the proceeding all parties to the action had considered the Regional Director's action final, or at least that further appeal would have been a useless gesture in view of the standards promulgated by the National Board and the

nature of the appellant's business. In *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, this court held that application to the National Labor Relations Board for appropriate relief was unnecessary to raise the issue at hand if it would be futile to make such application.

As far as this case is concerned, we submit that action by the Regional Director of the National Labor Relations Board may be equated to action by the Board itself, or if not, at least that an appeal to the National Board would have been a futile gesture.

Furthermore, we are of the conviction that state jurisdiction would attach absent a formal declination by the National Board if yardsticks promulgated by the Federal agency make it apparent that jurisdiction would be declined. The purpose behind the promulgation of standards by the National Labor Relations Board was to give notice in advance of those areas over which the agency would exercise jurisdiction. Requiring a claimant to go through the useless, expensive and delaying procedure of formal application to the National Board, would result in unsettled labor matters and the development of a prohibitive case load, with an attending expense which the National Board has attempted to reduce through its yardstick promulgation. And what conceivable effect could be given to the clause relieving such application "if it would be futile to do so"? *Kinard* case, supra. The purpose behind the very adoption of the standards of the Board would be frustrated if the Board itself were called upon to decide every jurisdictional question.

The brief *amicus curiae* filed by the United Steelworkers of America concedes that a declination by the National

Board has taken place in this case. Nevertheless, the Union and appellant are disturbed by the confusion that might result from this court's holding that state jurisdiction would attach to any labor dispute which appears to fall outside the area included in the National Labor Relations Board's standards, even though no application has been made to the National Labor Relations Board for relief. The Steelworkers point up various areas where allegedly diverse interpretations of the Board's standards could result in confusion. But the possible difference in interpretation is not peculiar to this situation. It is the same with any administrative regulation or statute. Doubt could only be finally erased by judicial determination. However, the possibility of differing interpretation is certainly not a basis for refusing state jurisdiction in such an instance.

Furthermore, whatever drawback might be pointed up regarding the possible amendment of the National Board's standards could also be said of any regulation or statute. All would be susceptible to change. The possibility that regulations, standards or statutes might be amended periodically has never been a basis for ruling out state jurisdiction in other areas where federal-local regulation has been at issue.

Some of the fears of the Union and appellant on this matter can probably be traced to the very nature of our government, for inherent in our federal system is the difficulty of drawing a hard and fast line between state and federal regulation under the Commerce Clause. *Weber* v. *Anheuser-Busch*, 348 U. S. 468, recognized the difficulty and held that the areas pre-empted by federal authority "are not susceptible of delimitation by fixed metes and bounds * * *."

Concede for argument that some confusion may exist under the N. L. R. B.'s jurisdictional standards in view of the peculiar relationship of the federal and state governments. Nevertheless this potential has never previously been a sufficient basis to rule out state regulation.

The problem that the Steelworkers and appellant raise in this instance is not answered by barring state jurisdiction in the interest of avoiding possible problems of interpretation and change in the future, for we still must live with the problem of greater magnitude, that of effecting a solution to labor disputes that are not regulated by federal authority, and can only be solved by state jurisdiction.

CONCLUSION

No matter how you slice it, the case boils down to this: Unfair labor practices will go unregulated entirely or they will be regulated by a state labor board in this instance.

In view of the authorities cited and reasoning set forth, we submit that a state may exercise jurisdiction over a labor controversy which involves interstate commerce if the National Board has declined to regulate the matter, as is the case at hand, or where an operation does not fall within the standards promulgated by the Board, therefore indicating it would be futile to apply to the National Board for relief. The judgment of the Supreme Court of the State of Utah should therefore be affirmed.

Respectfully submitted,

E. R. CALLISTER,
Attorney General of Utah,

RAYMOND W. GEE,
Assistant Attorney General
of Utah,

236 State Capitol,
Salt Lake City, Utah,

Attorneys for Appellee.